IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

No. 77-503

* * *

**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

TOMMY POTTS,
Respondent

* * *

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

ROBERT E. DE LONG, JR.
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Telephone: (512) 475-3281

Attorneys for Petitioner

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OCTOBER TERM, 1976

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
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V.

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* * *

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

* * *

The Petitioner, W. J. Estelle, Jr., Director, Texas Department of Corrections, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, for review of the Court of Appeals judgment entered in the above entitled cause on June 17, 1977.

OPINION BELOW

The summary opinion by the Court of Appeals below is attached to this Petition as Appendix A. A letter from the Court of Appeals summarily denying Petitioner's Motion for Rehearing and Rehearing en banc is attached as Appendix B.

The findings of fact and conclusions of law of the United States District Court for the Northern District of Texas, Dallas Division, and the court's order based on the findings and conclusions, are attached as Appendix C.

The prior opinion of the Court of Appeals that remanded the case to the District Court for further proceedings is reported as *Potts v. Estelle* at 529 F.2d 450 (1976); a copy of the opinion is attached as Appendix D.

The opinion of the Texas Court of Criminal Appeals that reviewed the state court conviction on direct appeal is reported as *Potts v. State* at 500 S.W.2d 156 (1973); a copy of the opinion is attached as Appendix E.

The order upon an application for writ of habeas corpus brought by the Respondent in the Texas Court of Criminal Appeals and entered on May 22, 1974, is attached as Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 17, 1977, with Petitioner's Motion for Rehearing and Rehearing en banc being denied on August 10, 1977 (Appendix A and B).

This Court has jurisdiction to grant a writ of certiorari pursuant to the provisions of 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Whether *Argersinger*[1] should be applied retroactively where prior counselless misdemeanor convictions used for impeachment purposes in a state court trial are challenged collaterally in a federal habeas corpus proceeding.

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[1]*Argersinger v. Hamlin*, 407 U.S. 25 (1972).

2. Whether the determination of how to apply *Argersinger* retroactively where prior counselless misdemeanor convictions are used for impeachment purposes in a state court trial presents a federal question.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to...an impartial jury...and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the United States Constitution provides, in part:

> No State shall...deprive any person of life, liberty, without due process of law...

STATEMENT OF THE CASE

This is an appeal from the order of the United States Court of Appeals for the Fifth Circuit entered June 17, 1977, in Cause No. 76-3383, styled *Tommy Potts v. W. J. Estelle.* In that order, the Court of Appeals summarily affirmed the District Court decision to grant habeas corpus relief to Potts. The District Court action was styled *Tommy Potts v. W. J. Estelle* and numbered Civil Action No. CA-3-74-694-B.

Petitioner was convicted in the 195th Judicial District Court of Dallas County, Texas, of the offense of murder with malice aforethought; punishment was assessed at 25 years imprisonment. The judgment of conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals in an opinion styled *Potts v. State* and reported at 500 S.W.2d 156 (1973).

Potts filed an application for writ of habeas corpus in the convicting court challenging nine of the misdemeanors that had been used to impeach him at trial. Potts asserted that the nine convictions were void since he had been without counsel at the time of the trial of those misdemeanors. The Texas Court of Criminal Appeals denied the application and issued a written opinion on May 22, 1974. Initially, the court said that since only four of the nine misdemeanor convictions involved jail time, only those four were subject to collateral attack, citing *Aldrighetti v. State*, 507 S.W.2d 770 (Tex.Crim.App. 1974). Then the court held that the admission of these four misdemeanor convictions, even if they were unavailable and erroneously admitted, constituted harmless error.

Potts filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas. On March 7, 1975, the District Court denied Potts' application for federal habeas corpus relief upon essentially the same grounds as was stated in the Texas Court of Criminal Appeals habeas corpus opinion.

Subsequently, the Court of Appeals reversed that order and remanded the case for further proceedings in the District Court in an opinion styled *Potts v. Estelle* reported at 529 F.2d 450 (1976). The Court of Appeals held that *Argersinger* is to be applied retroactively to all misdemeanor convictions used for impeachment where the maximum *possible* sentence for the misdemeanor included confinement, thereby rejecting the Texas Court of Criminal Appeals position that *Argersinger* should be applied in a collateral attack only where jail time was *actually imposed.*

On remand, the District Court considered an additional misdemeanor conviction and entered a judgment holding that a ratio of five invalid counselless

prior misdemeanor convictions out of the ten used for impeachment was not harmless error and granted habeas corpus relief to Potts. It is the affirmance of that judgment by the Court of Appeals that this Petition for Certiorari is sought.

REASONS FOR GRANTING THE WRIT

1. ARGERSINGER SHOULD NOT BE APPLIED RETROACTIVELY WHERE PRIOR COUNSELLESS MISDEMEANOR CONVICTIONS ARE USED FOR IMPEACHMENT PURPOSES IN A STATE COURT TRIAL, CHALLENGED COLLATERALLY IN A FEDERAL HABEAS CORPUS PROCEEDING.

This Court held in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) that, absent a proper waiver, a criminal defendant could not be *imprisoned* without having first had the benefit of counsel, regardless of the classification of the offense as a misdemeanor. Argersinger's conviction was not held to be "void" or "invalid." Only the sentence was affected by *Argersinger, see Berry v. Cincinnati*, 414 U.S. 29 (1973), and not the validity of the conviction, *see Furman v. Georgia*, 408 U.S. 238 (1972); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

The Texas Court of Criminal Appeals applied *Argersinger* so as to invalidate a misdemeanor conviction predating *Argersinger* only where jail time actually resulted, and not where jail time was only a potential punishment. *Aldrighetti v. State*, 507 S.W.2d 770 (Tex.Crim.App. 1974). In contrast, the Court of Appeals below held that *Argersinger* is to be applied

retroactively so as to invalidate all misdemeanor convictions[2] where there was a potential jail sentence. Where the prior conviction is used for impeachment, and not to impose confinement, the sole question is reliability. A prior conviction is not more *reliable* because of the punishment that was permissible or actually imposed. What difference does it make for impeachment purposes whether, at the prior misdemeanors, Potts actually received jail time, could have received jail time, or could not have received jail time? A prior counselless misdemeanor is either admissible or it is not, regardless of the punishment involved. Simply stated, whether a prior misdemeanor conviction would have violated the requirement of *Argersinger*, if the misdemeanor trial occurred today, has absolutely no bearing upon whether its admission for impeachment purposes violates Due Process.

The broad scope of federal habeas corpus as a remedy for state prisoners, established by lower federal courts following *Fay v. Noia*, 372 U.S. 391 (1963) and *Townsend v. Sain*, 372 U.S. 293 (1963), has aggravated the tension in federal-state relations.[3] While the writ serves many indispensable functions in assuring the

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[2]It is difficult to estimate the effect that such a retroactive application will have upon criminal justice. This Court can take judicial notice that a large number of case records reflect that misdemeanor convictions obtained before *Argersinger* have been used for impeachment. Undoubtedly such an application of *Argersinger* is far in excess of the original intendment of this Court and will likely result in the invalidation of a number of perfectly reliable criminal convictions.

[3]Wright and Sofaer, *Federal Habeas Corpus for State Prisioners: The Allocation of Fact Finding Responsibility*, 75 Yale L.J. 895 (1966); Burger, *Post-Conviction Remedies: Eliminating Federal-State Friction*, 61 J.Crim.L.C.&P.S. 148 (1970).

vindication of federal rights, this Court has recently attempted to relieve this tension by accommodating the habeas corpus procedure to the needs of the federal system without diluting its role in protecting fundamental rights. *Stone v. Powell*, ___ U.S. ___, 96 S.Ct. 3037 (1976); *LaVallee v. Delle Rose*, 410 U.S. 690 (1973). In *Stone*, the Court noted:

> "Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include '(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.' " *Stone v. Powell, supra* at 3050, n. 31.

In cases such as Potts', a convicted defendant is asking that the federal courts, by habeas corpus, redetermine an issue that has no bearing on the basic justice of his incarceration. What can be gained by retrying Potts, who committed a brutal murder by use of a firearm? Judicial resources would be squandered; state court determinations would not be final until the federal habeas corpus remedy was exhausted; friction would be increased between federal and state systems of justice; and the constitutional balance upon which the doctrine of federalism is founded would be further upset.

To be sure, the right to counsel is one of our most cherished constitutional rights. But how can a mechanical insistence on reversal, where prior counselless misdemeanor convictions decided before

Argersinger are utilized for impeachment, improve the reliability of the fact-finding process when Potts, *while represented by counsel at his state court trial*, admitted committing the very facts of the counselless prior misdemeanor convictions and stipulated to their introduction?[4]

2. THE DETERMINATION OF HOW TO APPLY ARGERSINGER RETROACTIVELY WHERE PRIOR COUNSELLESS MISDEMEANOR CONVICTIONS ARE USED FOR IMPEACHMENT PURPOSES IN A STATE COURT TRIAL IS NOT A FEDERAL QUESTION.

In *Argersinger*, the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. at 37. The Court went on to say, "How crime should be classified is largely a State matter." 407 U.S. at 38. The Texas Court of Criminal Appeals considered the retrospective application of *Argersinger* in *Aldrighetti v. State*, 507 S.W.2d 770 (Tex.Crim.App. 1974). That Court, the highest court of criminal appeals in the State of Texas, held that prior felony convictions which are otherwise admissible may be used for the purpose of impeachment, even though obtained while the defendant was not represented by counsel and had not waived counsel, so long as the punishment assessed in the prior convictions did not include actual imprisonment. That decision by the state court does not present a federal question. It is an evidentiary matter concerning state law only.

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[4]It should be noted that two of the five misdemeanor convictions utilized for impeachment at Potts' trial, held to be invalid by the District Court below, resulted in only a $5.00 fine.

The Court of Appeals in the first *Potts* opinion said, contrary to the pronouncement by the Texas Court of Criminal Appeals, that the necessity of counsel in Potts' prior misdemeanor prosecutions is to be judged by the maximum possible sentence he could have received in each of those prosecutions. Such holding is in clear conflict with the evidentiary determination by the Texas state courts regarding the application of *Argersinger* and in violation of this Court's mandate in *Argersinger* that state courts should determine the classification of crimes. The holding of *Argersinger* is not violated by the rule announced by the highest court of the State of Texas in *Aldrighetti*.

WHEREFORE, PREMISES CONSIDERED, your Petitioner prays that this Court grant a writ of certiorari to the United States Court of Apeals for the Fifth Circuit and upon argument hereof enter a judgment in favor of your Petitioner and thereby reverse the United States Court of Appeals for the Fifth Circuit and thus deny Tommy Potts' application for habeas corpus relief.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

ROBERT E. DE LONG, JR.
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Telephone: (512) 475-3281

Attorneys for Petitioner

PROOF OF SERVICE

I, Robert E. De Long, Jr., Assistant Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been served by placing same in the United States mail, postage prepaid, certified, on this the ____ day of _____, 1977, addressed as follows: Mr. John L. Hauer and Mr. Emil Lippe, Jr., AKIN, GUMP, STRAUSS, HAUER & FIELD, 2800 Republic National Bank Building, Dallas, Texas, 75201.

ROBERT E. DE LONG, JR.
Assistant Attorney General

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3383
Summary Calendar*

TOMMY POTTS,

Petitioner-Appellee,

versus

W. J. ESTELLE, Director,
Texas Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(June 17, 1977)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

The question of whether *Argersinger v. Hamlin*, 407 U.S. 25 (1972), should be applied retroactively where

[8]Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casulty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

prior counselless misdemeanor convictions have been used for impeachment purposes in a state court trial, and whether the use of said misdemeanor convictions can be challenged in a federal habeas corpus proceeding has been previously decided by this Court in *Potts v. Estelle*, 529 F.2d 450 (5th Cir. 1976).

The district court, after an evidentiary hearing, determined that petitioner was indigent, not represented by counsel, and had not waived counsel in five misdemeanor cases. The court concluded that admission of these five convictions into evidence was not harmless beyond a reasonable doubt. After reviewing the evidence, we hold that the factual findings of the district court are not clearly erroneous.

Finally, we have before us a question of exhaustion of state remedies. On the facts of this case, there has been adequate exhaustion.

Accordingly, the grant of the writ of habeas corpus is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1976

No. 76-3383
Summary Calendar

D. C. Docket No. CA-3-74-694-B

TOMMY POTTS,

Petitioner-Appellee,

versus

W. J. ESTELLE, Director,
Texas Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the **Northern District of Texas**

Before **THORNBERRY, RONEY and HILL, Circuit Judges.**

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the **Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, **affirmed.**

June 17, 1977

Issued as Mandate: **AUG 18 1977**

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

OFFICE OF THE CLERK

August 10, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-3383 - TOMMY POTTS v. W. J. ESTELLE

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing*,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth,
Clerk

By S/S
Deputy Clerk

**on behalf of appellant, W. J. Estelle,

cc: Mr. Robert E. DeLong, Jr.
Mr. John L. Hauer
Ms. Margaret L. Vandervalk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U. S. District Court
Northern District of Texas
FILED
AUG 2 1976
Joseph McElroy, Jr.,
Clerk

By _____
Deputy

TOMMY POTTS)
)
VS.) CIVIL ACTION NO.
) CA-3-74-694-B
W. J. ESTELLE, Director,)
Texas Dept. of Corrections)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to an Opinion and Order of Remand entered by the United States Court of Appeals for the Fifth Circuit on March 29, 1976 in the above styled and numbered cause, Appellate No. 75-2101, the Court conducted an evidentiary hearing to give applicant an opportunity to establish his indigency at the time of his conviction on each of ten misdemeanor charges used to impeach him in his trial for murder in the 195th Judicial District Court, Dallas County, Texas, in Cause No. C-71-4242-KN, and to determine whether or not, if indigent, applicant knowingly and intelligently waived

his right to counsel. Applicant appeared in person and with appointed counsel, the Honorable John L. Hauer. Respondent was represented by Assistant Attorney General Patrick P. Rogers. After hearing the testimony of the witnesses and considering the documentary evidence introduced in the proceeding, the Court finds:

1. That applicant was indigent at the time he was convicted on each of the misdemeanor charges.

2. That applicant and his counsel concede and that applicant was, in fact, represented by counsel at all stages of the proceedings in Causes numbered 25217-C, 2-17-66; 29829-D, 1-13-65; 19440-B, 6-24-60; 8007-C, 10-16-58; and 51239, 12-16-53, to which convictions respondent's exhibits numbered 2, 4, 5, 6, and 10, respectively, relate.

3. That in Causes numbered CCR 70-528-D, 9-15-70, and 10740-B, 10-17-55, to which respondent's exhibits numbered 1 and 7 respectively relate, the records do not reflect that applicant was represented by counsel at any stage of the proceedings and that, in fact, applicant was not represented by counsel.

4. That in Causes numbered 31067-B, 2-25-65; 6558-B, 12-16-53; and 6096-B, 12-16-53, to which respondent's exhibits numbered 3, 8 and 9 respectively relate, the records reflect that applicant was or may have been represented by counsel at some stage of the proceedings but the records do not reflect that he was represented by counsel at the time of entry of his pleas of guilty and conviction thereon and that applicant was not, in fact, represented by counsel at the time of his entry of pleas of guilty and his conviction thereon.

5. That applicant did not waive his right to counsel in any of the misdemeanor proceedings identified hereinabove.

6. That the convictions in Causes numbered CCR 70-528-D, 31067-B, 10740-B, 6558-B, and 6096-B were obtained in violation of applicant's right to counsel and that their use for impeachment purposes in Cause C-71-4242-KN deprived applicant of his right to due process of law.

7. That because the use of the invalid misdemeanor convictions identified in the preceding paragraph went directly to the question of applicant's credibility, because of the prosecutor's excessive argument directed at the invalid convictions, and because a relatively severe sentence was imposed on a man of rather advanced years, there is a reasonable possibility that the use of the invalid convictions contributed both to the conviction and the severity of punishment. Therefore, the error in use of the invalid convictions cannot be said to be harmless.

Based on the foregoing Findings of Fact, the Court concludes that the judgment of conviction and sentence of imprisonment imposed against applicant in Cause No. C-71-4242-KN in the 195th Judicial District Court of Dallas County, Texas should be vacated and applicant should be released from custody based thereon unless the State, at its election, should accord applicant a new trial and bring him to trial within a reasonable period of ninety (90) days from the date of entry of judgment herein, unless on written motion filed herein and for good cause shown that period of time should be extended.

ENTERED this 2 day of August, 1976.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TOMMY POTTS)
)
VS.) CIVIL ACTION NO.
) CA-3-74-694-B
W. J. ESTELLE, Director,)
Texas Dept. of Corrections)

ORDER

Based on the Findings and Conclusions heretofore entered in this cause, IT IS ORDERED:

1. The judgment of conviction and sentence of imprisonment imposed against applicant in Cause No. C-71-4242-KN in the 195th Judicial District Court of Dallas County, Texas is vacated and applicant shall be released from custody based thereon unless the State, at its election, should accord applicant a new trial and bring him to trial within a reasonable period of ninety (90) days from the date of entry of this order.

2. The ninety (90) day period fixed in the foregoing paragraph may be extended upon written motion filed

herein within such period for good cause shown.

A true copy of the Findings and Conclusions entered herein, together with this Order shall be served on counsel of record.

ENTERED this 2nd day of August, 1976.

_____
United States District Judge

APPENDIX D

CORRECTED **DOCKETED**

U. S. District Court
Northern District of Texas
FILED
APR 26 1976
Joseph McElroy, Jr., Clerk
By S/S
Deputy

POTTS v. ESTELLE

Tommy POTTS, Petitioner-Appellant,

v.

W. J. ESTELLE, Director, Texas Department of Corrections,
Respondent-Appellee

No. 75-2101

United States Court of Appeals,
Fifth Circuit.

March 29, 1976.

State prisoner filed a petition for a writ of habeas corpus. The United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., denied relief and petitioner appealed. The Court of Appeals, Thornberry, Circuit Judge, held that where a misdemeanor conviction could result in a sentence of imprisonment, an indigent defendant is entitled to appointment of counsel; that an evidentiary hearing was required to determine whether defendant was indigent at the time of nine prior misdemeanor convictions which could have resulted in imprisonment and whether he

had waived counsel prior to those convictions; and that if defendant was indigent and had not waived counsel at the time of those convictions, their use to impeach him at the subsequent trial was not harmless error beyond a reasonable doubt.

Reversed and remanded.

1. Federal Civil Procedure — 656

Standard against which pro se complaints and petitions is measured should be loose enough to accommodate inartful pleader.

2. Habeas Corpus — 54

Pro se habeas corpus petition, which emphatically cited Supreme Court cases concerning use of uncounseled prior convictions to impeach accused and which alleged that petitioner did not waive his right to counsel at time of such prior convictions, adequately alleged petitioner's indigency at times of convictions complained of. 28 U.S.C.A. § 2254.

3. Criminal Law — 641.2
Witnesses — 337(5)

If misdemeanor conviction can result in sentence of imprisonment, indigent defendant is entitled to appointment of counsel; and convictions obtained in violation of this rule may not be used to impeach defendant in subsequent prosecution.

4. Habeas Corpus — 59

On petition for writ of habeas corpus asserting that state improperly used prior uncounseled misdemeanor convictions to impeach petitioner's credibility, evidentiary hearing was required to determine whether petitioner was indigent at time of misdemeanor convictions and to determine whether he had waived counsel prior to those convictions.

5. Habeas Corpus — 25.1(8)

Where success of defendant's testimony hinged in large measure on credibility assessment made of him by jury, introduction of nine uncounseled misdemeanor convictions to impeach defendant's credibility was not harmless error beyond reasonable doubt.

6. Habeas Corpus — 96

In determining whether introduction of uncounseled misdemeanor convictions to impeach defendant's credibility was harmless error, court was not bound by appraisal of importance or unimportance reflected in trial attorney's failure to object at trial, but proper test was whether there was reasonable possibility that evidence complained of might have contributed to defendant's conviction.

7. Habeas Corpus — 25.1(8)

In view of fact that Supreme Court decision extending indigent's right to appointed counsel to misdemeanor trials was not decided until after petitioner's state court trial, trial counsel's failure to object to prior uncounseled misdemeanor convictions introduced to impeach petitioner's credibility did not waive petitioner's right to subsequently raise that issue on habeas corpus. 28 U.S.C.A. § 2254.

8. Habeas Corpus — 85.1(3), 85.2(2)

Burden is on state to demonstrate that indigent defendant waived right to counsel and every reasonable presumption against waiver must be indulged by reviewing court.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, SIMPSON and MORGAN,

Circuit Judges.

THORNBERRY, Circuit Judge:

Appellant Tommy Potts was convicted by a jury of murder and sentenced to twenty-five years in the custody of the Texas Department of Corrections. His conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals. *See Potts v. State*, 500 S.W.2d 156 (Tex.Cr.App.1973). Appellant's subsequent application for state habeas corpus relief was denied by the trial court without a hearing, and this denial was affirmed per curiam by the Court of Criminal Appeals. Appellant then filed a section 2254 habeas petition in federal district court. *See 28 U.S.C.* § 2254. The latter petition was also denied without a hearing, and the appeal at bar followed.

The principal object of appellant's collateral attack on his state murder conviction is the prosecution's use of ten previous misdemeanor convictions received over a period of approximately seventeen years to impeach the "self defense" testimony proffered by appellant at his trial. Appellant alleges in his federal petition that he was not represented by counsel at any stage in the disposition of these misdemeanors and that use of these prior convictions for impeachment purposes violates the rule of *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), as applied retroactively in *Berry v. Cincinnati*, 414 U.S. 29, 94 S.Ct. 193, 38 L.Ed.2d 187 (1973). In his state habeas petition, which is incorporated by reference in the federal petition, appellant further alleges that he did not waive his right to counsel at the times of the misdemeanor prosecutions. On the strength of these allegations and for the following reasons, we remand appellant's petition to the district court for an evidentiary hearing.

[1, 2] The State of Texas initally contends that

appellant's federal habeas petition is materially deficient because it does not allege indigency at the times of the misdemeanor convictions with sufficient clarity. Though it is a close question, we are of the opinion that appellant's *pro se* petition could not be dismissed on the basis of an inadequate allegation of indigency. The standard against which we measure *pro se* complaints and petitions is and should be loose enough to accommodate the inartful pleader. *See Haines v. Kerner*, 404 U.S. 519, 520—21, 92 S.Ct. 594, 595—96, 30 L.Ed.2d 652, 653—654 (1972); *cf. Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Admittedly, at no point in the pleadings filed in state and federal courts does appellant explicitly allege that he was indigent at the times he suffered the misdemeanor prosecutions and convictions. The emphatic reliance in his pleadings on *Argersinger* and *Berry*, however, delineates the nature of the federal claim asserted: an improper use of convictions obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See Burgett v. Texas*, 389 U.S. 109,88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Coupled with reliance on *Argersinger* and *Berry*, appellant's additional allegation that he did not waive his right to counsel provides the functional equivalent of an express allegation of indigency. Examining appellant's pleadings in a manner consistent with *Haines*, we cannot say that it appears "beyond doubt that [appellant] can prove no set of facts in support of his claim which would entitle him to relief." *See Haines v. Kerner*, 404 U.S. at 521, 92 S.Ct. at 596, 30 L.Ed.2d at 654. Accordingly, we hold that the district court erred in not affording appellant an opportunity to demonstrate his indigency at the times of his misdemeanor convictions. Moreover, if on remand appellant can establish his indigency at the times in question, *see Kitchens v. Smith*, 401 U.S. 847, 91 S.Ct. 1089, 28

L.Ed.2d 519 (1971), the district court must then determine whether appellant knowingly and intelligently waived his right to counsel. *See Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Wynn v. Smith*, 446 F.2d 341, 349 (5 Cir. 1971); *Goodwin v. Smith*, 439 F.2d 1180, 1182—83 (5 Cir. 1971); *Hillyer v. Dutton*, 379 F.2d 809 (5 Cir. 1967); *Davis v. United States*, 376 F.2d 535 (5 Cir. 1967).

Of the ten misdemeanor convictions used to impeach appellant's testimony, only six resulted in actual imprisonment for appellant.[1] The findings and conclu-

1. **The following table displays appellant's prior convictions.**

Date of Conviction	Charge	Maximum Possible Penalty	Imprisonment Imposed
12/16/53	Procuring	Six months imprisonment plus $200 fine	None
12/16/53	Procuring and Vagrancy	Procuring same as above; $200 fine for vagrancy	None
12/16/53	Procuring	Same as above	30 days
10/17/55	Worthless Check	Two years imprisonment plus $1000 fine	None
10/16/58	Procuring, reduced to Vagrancy	Vagrancy same as above	None
6/24/60	Procuring	Same as above	60 days
1/13/65	Procuring	Same as above	30 days
2/25/65	Procuring	Same as above	60 days
2/17/66	Procuring	Same as above	30 days
9/15/70	Worthless Check	Two years imprisonment plus $2000 fine	30 days

sions of the United States Magistrate, adopted by the district court as its own, were to the effect that the prosecution's use of these six misdemeanor convictions was harmless error. *See Chapman v. California*, 386 U.S. 18, 87, S.Ct. 824, 17 L.Ed.2d 705 (1967). As the Court of Criminal Appeals had done before him, the Magistrate assumed that the uncounseled convictions for which imprisonment had not been assessed were admissible for impeachment purposes. He found the additional damage to appellant's credibility through introduction, albeit unconstitutional, of the misdemeanor convictions for which imprisonment had been assessed to be of a low order.

In *Argersinger* the Supreme Court left open the question of Gideon's application to the situation where the maximum possible sentence for a particular offense is imprisonment, but the sentence actually imposed is only a fine or a term of imprisonment that is suspended. 407 U.S. at 37, 92 S.Ct. at 2012, 32 L.Ed.2d at 538. In *Thomas v. Savage*, 513 F.2d 536 (5 Cir. 1975), a habeas petitioner challenged the prosecution's use of an uncounseled misdemeanor conviction in the punishment stage of his state trial for robbery by assault. The misdemeanor conviction at issue—aggravated assault—carried a possible maximum sentence of two years imprisonment and a $1000 fine. Though ultimately holding admission of the misdemeanor conviction to be harmless error, the panel in *Thomas* did answer the question left open in *Argersinger*.

> The necessity for counsel is judged by the maximum penalty the defendant *may* receive. . . . In this respect the cases of this circuit go beyond the Supreme Court's decision in *Argersinger v. Hamlin*, . . . , which would only require the appointment of counsel when a sentence of

imprisonment is imposed.

513 F.2d at 537 (emphasis in original); *See Olivera v. Beto*, 429 F.2d 131 (5 Cir. 1970).

The answer provided by the "cases of this circuit" to the *Argersinger* question has not, however, always been the same. In *Cottle v. Wainwright*, 477 F.2d 269 (5 Cir. 1973), petitioner was, following his release on parole, convicted without the benefit of counsel on a charge of public drunkenness. The municipal court imposed the maximum penalty of twenty days imprisonment, but suspended the sentence. Approximately one month later, petitioner was again convicted without the assistance of a lawyer on a charge of public drunkenness, and the municipal court imposed an unsuspended sentence of twenty days. As might be expected, petitioner's parole was revoked following the second conviction. Challenging the revocation by way of habeas corpus, petitioner contended that reliance by the parole board on his convictions for public drunkenness ran afoul of *Argersinger*. After correctly anticipating the retroactivity of *Argersinger*, both the majority of the panel, 477 F.2d at 273, and their concurring brother, 477 F.2d at 277, held that *Argersinger* applied only to the second misdemeanor conviction, for which imprisonment had actually been imposed.[2]

[2]The decision in *Cottle* was vacated by the Supreme Court on other grounds and remanded for reconsideration in light of *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1956, 36 L.Ed.2d 656 (1973). *See Cottle v. Wainwright*, 414 U.S. 895, 94 S.Ct. 221, 38 L.Ed.2d 138 (1973), *on remand*, 493 F.2d 397 (5 Cir. 1974). The holding of the original *Cottle* panel that *Argersinger* only applied to the second misdemeanor conviction stands unaffected by the subsequent procedural events.

[3] Confronted with the choice between *Cottle* and *Thomas*, we follow the latter. *Accord Olivera v. Beto*, *supra*; *Matthews v. Florida*, 422 F.2d 1046, 1048 (5 Cir. 1970); *James v. Headley*, 410 F.2d 325, 329 (5 Cir. 1969). The logic of our choice should be clear. By dint of the serious problems associated with the prosecution of misdemeanors, the great concern in *Argersinger* was with the salutary contributions to be made through the presence of a lawyer in the courtroom representing the interest of the accused. 407 U.S. at 36—37, 92 S.Ct. at 2012, 32 L.Ed.2d at 537—538. The issues that arise in misdemeanor prosecutions are often complex and beyond the usual competence of the accused. Whether a sentence of imprisonment is or is not ultimately imposed has little bearing on the complexity of those issues or the ability of the accused to defend himself in the circumstance. Indeed, it may be that the most reliable barometer of the potential problems that can arise in such prosecutions is the maximum penalty the legislature has seen fit to designate for a particular misdemeanor.;

Application of the *Cottle* rule, which looks to the punishment in fact assessed, can lead to curious practical results. For example, where co-defendants are tried together, the judge or the jury, as the case may be, sometimes imposes different sentences on the different co-defendants. Under the *Cottle* rule, a situation can arise where a co-defendant who is convicted but has his sentence suspended is not protected by *Argersinger*, but his co-defendant—convicted of the same crime—is not subject to later impeachment with his conviction because he is the recipient of a jail term. *See Aldrighetti v. State*, 507 S.W.2d 770, 773—75 (Tex.Cr.App.1974) (Onion, P. J., dissenting). The rule of *Thomas* avoids the type of situation depicted above and is, we believe, consonant with the concerns expressed by the Supreme Court in *Argersinger*. For these reasons, we hold that the

necessity of counsel in appellant Potts's prior misdemeanor prosecutions is to be judged by the maximum possible sentence he could have received in each of those prosecutions.

All but one of the ten misdemeanor convictions introduced to impeach appellant's testimony at his state murder trial carried a potential sentence of imprisonment. Only appellant's vagrancy conviction in 1958, *see* note 1 *supra*, was limited in possible punishment to a fine, and vagrancy convictions are themselves rightfully subject to a healthy dose of skepticism. *Argersinger v. Hamlin*, 407 U.S. at 33, 92 S.Ct. at 2010, 32 L.Ed.2d at 536; *see Papachristou v. Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1974). In consequence, if appellant Potts is able to establish prior indigency and the district court finds an absence of knowing and intelligent waivers at the times of the prior misdemeanor prosecutions, it will be the case that nine of the ten misdemeanor convictions used to impeach appellant were admitted in violation of *Argersinger*. See *Thomas v. Savage, supra*. Whatever may be the merit of the State's harmless error argument given a different ratio between convictions properly admissible and those subject to exclusion under *Argersinger*, the argument carries little weight where the actual ratio is one to nine.

[4-8] Appellant was tried for the murder of an innocent bystander struck by a bullet intended, the State successfully argued to the jury, for appellant's brother. It was appellant's testimony at trial that his brother advanced upon him with a large knife and that the fatal bullet was fired at the floor to discourage further advances by his attacker.[3] The success of

[3]Both appellant and his brother testified that the fatal bullet was fired at the floor as a warning shot. The jury was instructed on both self-defense and accident. *See Potts v. State*, 500 S.W.2d 156, 157, (Tex.Cr.App. 1973).

appellant's testimony hinged in large measure on the credibility assessment made of him by the jury. The State's use of the misdemeanor convictions went, of course, directly to the question of appellant's credibility. We reject the State's argument that introduction of the nine uncounseled misdemeanor convictions was harmless error beyond a reasonable doubt.[4] *See Loper v. Beto*, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972); *Chapman v. California, supra*. On the contrary, if appellant is able to satisfactorily establish indigency at the pertinent times, and the district court determines that appellant did not knowingly and intelligently waive his right to counsel at those times, it follows that the writ must issue unless the State retires appellant within a reasonable time to be determined by the district court. It must be borne in mind that given a silent record, the burden is on the State to demonstrate the appropriate waiver, *Ford v. Wainwright*, 526 F.2d 919 (5 Cir. 1976); *Wynn v. Smith, supra*, and every reasonable presumption against waiver must be

[4]The State argues that the failure of appellant's attorney to object at the time the misdemeanor convictions were introduced supports its contention that introduction of these convictions was harmless error. Brief for Appellee at 8. We are not bound, in making our harmless error determination, by the appraisal of importance or unimportance reflected in an attorney's failure to object at trial. The proper test, and the one we apply, is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1964), *quoted approvingly in Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, 710 (1967).

On another, related matter, the State cannot contend that failure to object at the time of trial constituted a waiver and precludes appellant's sixth amendment challenge. It need only be noted that appellant was convicted on November 19, 1971, and the decision in *Argersinger* was not handed down until June 12, 1972. *See Berry v. Cincinnati*, 414 U.S. 29, 94 S.Ct. 193, 38 L.Ed.2d 187 (1973).

indulged by the court below. *United States v. Shea*, 508 F.2d 82 (5 Cir. 1975).

Accordingly, we reverse and remand the case for proceedings in the district court consistent with this opinion.[5]

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[5]We have examined petitioner's other contentions and find them to be without merit. *See Dumont v. Estelle*, 513 F.2d 793 (5Cir. 1975).

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By S/S
Deputy

New Orleans, Louisiana **APR 20 1976**

APPENDIX E

OPINION

MORRISON, Judge.

The offense is murder; the punishment, twenty-five (25) years.

[1] By his first ground of error appellant challenges the sufficiency of the evidence to show that appellant was acting with his malice aforethought when he fired the shot that killed Mary Carroll, the injured party named in the indictment. The State takes the position, and we agree, that the evidence is sufficient to show that appellant was actuated by his malice aforethought when he pointed his pistol at Ike Potts and fired the same and that such malice, under Art. 42, Vernon's Ann.P.C., carried over to the killing of Mary Carroll, who was actually shot by the discharge of the pistol. Appellant admitted firing at Ike, but contends he was acting in his own self-defense. The jury was charged on the law of self-defense and by their verdict refused to accept the same. They also rejected under an appropriate charge on accident the contention that the second shot fired in Ike's direction was also fired in an effort to scare Ike and not to kill him but accidentally killed the deceased.

We do not find this to be a case where the circumstantial evidence relied upon by the prosecution was obviously weak as in Ysasaga v. State, Tex.Cr.App., 444 S.W.2d 305, relied upon by appellant. The affidavit attached to appellant's brief allegedly from a witness at the trial may not be considered. Grayson V. State, 91 Tex.Cr.R. 137, 236 S.W.1110.

[2] Recently in Ortegon v. State, Tex.Cr.App., 459 S.W.2d 646, we had occasion to reaffirm the rule that

"proof of the intentional shooting of one with a gun is sufficient to authorize a jury to find that the shooting was actuated by malice".

In Covert v. State, Tex.Cr.App., 113 S.W.2d 556, this Court upheld a conviction where a defendant shot at one person intending to hit him and accidentally shot another. See also Martin v. State, 134 Tex.Cr.R. 379, 115 S.W.2d 913.

Appellant's first ground of error is overruled.

[3] His second ground of error is that his trial counsel demonstrated that he was ineffective when he failed to object to questions propounded to appellant at the guilt stage about prior convictions which were inadmissible because of the rule of remoteness.

Appellant was first questioned about a conviction which occurred in 1966 and admitted his identity. This was followed by questions about 1965 convictions, then a 1960 conviction, and finally the 1958 and 1953 convictions, all of which involved moral turpitude.

In Castillo v. State, Tex.Cr.App., 411 S.W.2d 741, we pointed out that the intervening convictions demonstrated the accused's failure to reform, thus making the earlier convictions admissible.

Finding no reversible error, the judgment is affirmed.

APPENDIX F

EX PARTE TOMMY POTTS
WRIT NO. 4680

APPLICATION FOR WRIT OF HABEAS CORPUS OF DALLAS COUNTY

ORDER

This is an application for writ of habeas corpus filed by an inmate in the Texas Department of Corrections pursuant to Article 11.07, V.A.C.C.P.

Petitioner was convicted of the offense of murder with malice in the 195th District Court of Dallas County, Texas, and assessed a twenty-five (25) year term of imprisonment on November 19, 1971. The conviction was affirmed on appeal. See Potts v. State, 500 S.W.2d 156 (Tex.Cr.App. 1973).

The petitioner makes several allegations in his application, and all of these contentions have been reviewed, and have been found to be frivolous, and without merit, except for petitioner's contention that he was impeached with numerous misdemeanor convictions which were void since petitioner was without counsel at the time of those misdemeanor convictions. We are of the opinion that this last contention requires a more thorough analysis.

According to petitioner's record on appeal, our appeal No. 46,580, petitioner testified at his trial, and at that time was impeached by the state with the use of nine misdemeanor convictions. We have reviewed the record and note that only four of these nine misdemeanor convictions involved the assessment of jail time, therefore, only these four convictions are subject to collateral attack pursuant to this Court's opinion in Aldegretti v. State, ___ S.W.2d ___ (Tex.Cr.App. No.47,735, delivered March 27, 1974).

After a careful review of petitioner's pleadings, it is noted that *no where* in the pleadings does the petitioner allege that he was ever indigent and unable to retain counsel at any of these four misdemeanor trials. In fact, the record shows that petitioner was employed at the date of the instant trial, and was represented by retained counsel at that time. Also, the nature of the misdemeanors involved, most of them being for procuring, lead us to the conclusion that petitioner was probably not destitute at the time of any of these prior convictions.

Absent a showing of indigency, petitioner has not met his burden of proof to show that he was *denied* counsel at the time of these prior convictions. See and compare Mabry v. State, 492 S.W.2d 951 (Tex.Cr.App. 1973); Ex parte Bird, 441 S.W.2d 49 (Tex.Cr.App. 1970).

We recognize that the use of void misdemeanor convictions for the purpose of impeachment can taint the validity of a criminal trial. See and compare Argersinger v. Hamlin, ___ U.S. ___, 92 S.Ct. 2006; Ex parte Olivera, 489 S.W.2d 586 (Tex.Cr.App. 1973); Loper v. Beto, ___ U.S. ___, 92 S.Ct. 1014. We also note that, in some cases, the error in using these prior convictions has been held to be harmless. See Mabry v. State, 492 S.W.2d 951 (Tex.Cr.App. 1973); Madeley v. State, 488 S.W.2d 416 (Tex.Cr.App. 1973); McComb v. State, 488 S.W.2d 105 (Tex.Cr.App. 1972); Williams v. State, 493 S.W.2d 863 (Tex.Cr.App. 1973).

In the case at bar, we note that not only did the state properly impeach with five misdemeanor convictions during the guilt-innocence stage of the trial, but also the state admitted evidence of twelve convictions for liquor law violations at the punishment stage of the trial. We are of the opinion that the admission of these four misdemeanor convictions, even if error, constituted only

harmless error under the circumstances of the case.

For the reasons stated herein above, this application for writ of habeas corpus is denied.

(IT IS SO ORDERED THIS THE 22nd DAY OF MAY 1974.)

PER CURIAM